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# IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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SAMUEL LEWIS, DIRECTOR OF DEPARTMENT OF CORRECTIONS, ARIZONA STATE PRISON
PETITIONER,

-VS-

TERRY L. WEBB,
RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## SUPPLEMENTAL APPENDICES FOR PETITION FOR WRIT OF CERTIORARI

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# APPENDIX C

[Filed May 3, 1993]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| TERRY L. WEBB,<br><br>Petitioner<br><br>v.<br><br>SAM LEWIS, et al.,<br><br>Respondents. | ) | CIV 90-1608-PHX-SMM<br><br>JUDGMENT |

This action came on for consideration before the Court, the Honorable , United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that having this Court adopting in part and rejecting in part the Report and Recommendation; Petitioner take nothing. This petition and action are hereby dismissed.

Dated at Phoenix, Arizona, this 3rd day of May 1993

RICHARD H. WEARE, Clerk

cc to: all counsel

By:_____
Deputy Clerk

[Filed May 3, 1993]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

| | | |
|---|---|---|
| TERRY L. WEBB,<br><br>Petitioner,<br><br>v.<br><br>SAM LEWIS, et al.,<br><br>Respondents. | ) | CIV 90-1608-PHX-SMM<br><br>ORDER |

Petitioner is an inmate incarcerated in the Arizona State Prison Complex, Florence, Arizona. Petitioner was convicted of child molestation and sexual conduct with a minor in the Arizona State Court. Pending before this Court is Petitioner's Petition for Writ of Habeas Corpus. On July 15, 1992, the Magistrate Judge filed a Report and Recommendation that the Petition be denied on its merits because the admission of certain hearsay statements did not violate Petitioner's rights under the Confrontation Clause of the Sixth and Fourteenth Amendments. Plaintiff failed to file any objections to the

Report and Recommendation. Accordingly, Petitioner waived his right to have this Court address the Magistrate Judge's findings of fact de novo. See 28 U.S.C. section 636(b)(1). Also pending before the Court is Petitioner's motion for appointment of counsel.

## I. BACKGROUND

Webb was charged and convicted in an Arizona State Court with one count of child molestation and one count of sexual conduct with a minor. After a jury trial, Webb was sentenced to consecutive prison terms of seventeen and twenty years.

At the time of the trial, the victim was three years old. During the trial, the trial court found the victim unavailable to testify as a witness because she was unwilling to talk about the alleged behavior of Webb. As a result, the trial court permitted four witnesses (the victim's mother, babysitter, psychotherapist and physician) to testify about certain out-of-court statements made by the victim. Additionally, the trial court permitted the jury to view a videotape of the victim conducted at the Children's Hospital and Health Center in San Diego, California. Webb objected to the statements and the videotape.

After his conviction and sentence, Webb filed a direct appeal, arguing that the admission of the victim's out-of-court statements violated his rights under the Confrontation Clause of the Sixth and Fourteenth Amendments. The Arizona Court of Appeals affirmed his conviction and the Arizona Supreme Court denied review.

As stated in the Report and Recommendation, Webb exhausted his state remedies with respect to the claims asserted in this federal habeas petition. All Claims were presented to the highest state court for review. Rose v. Lundy, 455 U.S. 509, 523, 102 S. Ct. 1198 (1982). Accordingly, the Report and Recommendation correctly found that the merits of Petitioner's claims should be addressed.

## II. DISCUSSION

As the Report and Recommendation correctly states: "The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Maryland v. Crag, 110 S. Ct. 3157, 3162 (1991); Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988). The right of confrontation includes physical presence of the

witness, forces the witness to testify under oath and submit to cross examination and permits the jury to observe the demeanor of the witness. Crag, 110 S. Ct. at 3163. The "combined effect of these elements" is to ensure the reliability of the evidence admitted against the accused. Id.

There is no absolute right to a face-to-face confrontation at trial. Id. at 3163. While the Confrontation Clause reflects a preference for face-to-face confrontation at trial, there may be certain narrow circumstances where competing interests warrant dispensing with confrontation at trial. Id. at 3165. One of these narrow circumstances may arise when a state has an "interest in the physical and psychological well-being of child abuse victims." Id. at 3167. Accordingly, the Confrontation Clause permits, where necessary, the admission of certain hearsay statements against a defendant, despite the defendant's inability to confront the declarant at trial. Id. at 3157.

In order to meet the requirements of the Confrontation Clause, the prosecution must (1) prove or demonstrate the unavailability of the declarant, whose statement it wishes to use and, (2) demonstrate

that the statement bears adequate indicia of reliability. Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990). The "indicia of reliability" requirement is met when the hearsay statement falls under a "firmly rooted hearsay exception" or the statement is supported by a showing of particularized guarantees of trustworthiness. Id. at 3147.

Admission under a firmly rooted hearsay exception satisfies the Confrontation Clause because of the "weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements" Id. Admission under a showing of "particularized guarantees of trustworthiness" satisfies the Confrontation Clause, if under the totality of the circumstances surrounding the making of the statement, the evidence is at "least as reliable as evidence admitted under a firmly rooted hearsay exception." Id. at 3149.

In the present case, the state court found the victim unable to testify and, therefore, unavailable to testify at Petitioner's trial. At the time of the trial, the victim was three years old. Both the prosecution and defense counsel represented to the trial court that the victim was uncommunicative. Furthermore, defense counsel chose

not to call the victim as a witness. Accordingly, the Court agrees with the Report and Recommendation that the victim was an unavailable witness within the meaning of the Confrontation Clause.

Having determined that the victim was "unavailable" the trial court found that the hearsay statements made to the child's mother and baby sitter were admissible under A.R.S. section 13-1416 and "other exceptions to the hearsay rule." The trial court also found the statements made to the child's psychotherapist and physician admissible under exceptions to the hearsay rule.

A.R.S. section 13-1416 was held unconstitutional by the Supreme Court of Arizona. See State v. Robinson, 735 P.2d 801, 808 (1987). However, the Arizona Court of Appeals found that, despite the inappropriate admission of the statements under A.R.S. section 13-1416, the statements made to the victim's mother and babysitter were admissible under Arizona's catch-all hearsay exception. Admission of the statements made to the psychotherapist and physician were affirmed as statements made for purposes of medical diagnosis and treatment under Rule 803(4), Arizona Rules of Evidence.

The Report and Recommendation found the statements made by the child to her mother and babysitter not violative of the Confrontation Clause because there were particularized guarantees of trustworthiness and the statements fell under a firmly rooted hearsay exception. This Court adopts that part of the Report and Recommendation holding the statements had particularized guarantees of trustworthiness. However, the Court rejects that part of the Report and Recommendation holding that the victim's statements to her mother and babysitter fit into a firmly rooted hearsay exception.

Evidentiary questions are a matter of state Law. Estelle v. McGuire, 112 S. Ct. 475, 480 (1991). The Arizona Court of Appeals specifically held that the victim's statements to her mother and babysitter were not admissible under any of Arizona's hearsay exceptions, except for the catch-all provision. See Exhib. D. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution laws or treaties of the United States." Id.

Courts to determine if Petitioner's rights under the Confrontation Clause were violated. Id.; see also, Crag, 110 S. Ct. at 3163 (applying state evidentiary ruling in Confrontation Clause analysis).

**A. Statements to Mother and Babysitter**

A residual hearsay exception or catch-all exception is not a firmly rooted hearsay exception. Wright, 110 S. Ct. at 3147. A residual exception:

> . . . [A]ccommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.

Id. 3147-48.

Because the catch-all provision is not a firmly rooted hearsay exception, the Court must determine if there were particularized guarantees of trustworthiness surrounding the making of the

statements to satisfy the Confrontation Clause. Wright, 110 S. Ct. at 3149.

While the Supreme Court specifically declined to create a "mechanical test" for determining particularized guarantees of trustworthiness, the Supreme Court recognized several factors useful in determining if a child victim's statements have sufficient indicia of reliability: (1) the spontaneity of the statement and its consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of a motive to fabricate. Wright, 110 S. Ct. at 3150. This list is not exhaustive. Id.

This Court adopts the Report and Recommendation that, under the totality of the circumstances, there were particularized guarantees of trustworthiness surrounding the making of the statements to satisfy the Confrontation Clause. When the victim made statements to her mother and babysitter, she was approximately two and one-half years old. She was suffering from the pain and distress of Petitioner's assaults. The victim made her initial statements without any prompting, and when she repeated her statements they were

consistent with one another. There also was no evidence that the victim had any motive to fabricate her story. Last, the statements expressed an unusual sexual knowledge for a child of two-and one-half years.

Accordingly, the Court holds that the admission of the victim's statements to her mother and babysitter did not violate Petitioner's rights under the Confrontation Clause.

**B. Statements to Proctor and Strickland**

Statements the victim made to her psychotherapist and physician were upheld under Arizona Rule of Evidence 803(4) and Arizona's catch-all provision. Rule 803(4) provides for the admission of statements which are:

> . . . made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Statements made for the purpose of diagnosis or treatment are considered a firmly rooted hearsay exception. Wright, 110 S. Ct. at 3152. The rationale for admitting such statements is that the declarant's motive for receiving proper medical care guarantees the

trustworthiness of the statements. The crucial question is whether the statement was reasonably pertinent to diagnosis or treatment. United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979).

Proctor was the victim's psychotherapist and Strickland was the victim's medical doctor. The record is unclear on the victim's motive for making the statements. However, the statements were elicited in the course of her diagnosis by Proctor and Strickland. Accordingly, the Court cannot say that admission of these statements violated Petitioner's rights under the Confrontation Clause.

Additionally, there were particularized guarantees of trustworthiness surrounding the making of these statements. The statements were made without the use of leading questions and showed an unusual knowledge of sexual conduct for a two and one-half year-old child. The statements also were consistent with those made previously to her mother and babysitter. Thus, the totality of the circumstances surrounding the making these statements have particular guarantees of trustworthiness to satisfy the Confrontation Clause.

Accordingly, the Petition for writ of habeas corpus is dismissed.

## III. MOTION FOR APPOINTMENT OF COUNSEL

Also pending before the Court is Petitioner's Motion for Appointment of Counsel. Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances indicate that appointed counsel is necessary to prevent due process violations. Chaney v. Lewis, 801 F.2d 1191, 1196 (9th cir. 1986), cert. denied, 481 U.S. 1023, 107 S. Ct. 1911, 95 L. Ed 2d 516 (1987); Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970); Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996, 86 S. Ct. 582, 15 L. Ed. 2d 483 (1966). Further, the Court has discretion to appoint counsel when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2) (1988). Petitioner has not made the necessary showing for appointment of counsel.

## CONCLUSION

The Petition for writ of habeas corpus shall be dismissed. The Court adopts the Report and Recommendation that statements made by the child to her mother and babysitter did not violate the Confrontation Clause because there were particularized guarantees of trustworthiness. The Court rejects the Report and

Recommendation that these statements fall under a firmly rooted hearsay exception. Additionally, statements made to the child's psychotherapist and physician did not violate the Confrontation Clause because they were admitted under the firmly recognized exception of statements made for the purpose of diagnosis and treatment. These statements also were surrounded by particularized guarantees of trustworthiness.

IT IS THEREFORE ORDERED adopting in part and rejecting in part the Report and Recommendations.

IT IS FURTHER ORDERED denying the Petition for writ of habeas corpus.

IT IS FURTHER ORDERED denying Petitioner's Motion for Appointment of Counsel (DOC. #25).

DATED this 30th day of April, 1993.

Stephen M. McNamee
United States District Judge

copies to all counsel and Terry L. Webb

# APPENDIX D

[Filed July 20, 1992]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| TERRY L. WEBB,<br><br>Petitioner,<br><br>v.<br><br>SAM LEWIS, et al.,<br><br>Respondents. | ) | CIV 90-1608-PHX-SMM (SLV)<br><br>REPORT AND RECOMMENDATION |

TO THE HONORABLE STEPHEN M. McNAMEE:

Terry L. Webb, presently confined at the Arizona State Prison Complex in Florence, Arizona, filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Respondents filed an Answer and Petitioner replied.

## BACKGROUND

Webb was charged by the State of Arizona with one count of child molestation and one count of sexual conduct with a minor.

The victim, Heather, was only three years old at the time of Webb's jury trial. Following an unsuccessful attempt, pursuant to A.R.S. §13-4253(B),[1] to videotape her testimony, the trial court declared that Heather was unavailable as a witness. She did not testify.

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1. A.R.S. §13-4253(B) provides:

> The court, on motion of the prosecution, may order that the testimony of the minor be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection A may be present during the taking of the minor's testimony, and the persons operating the equipment shall be confined from the minor's sight and hearing as provided by subsection A. The court shall permit the defendant to observe and hear the testimony of the minor in person but shall ensure that the minor cannot hear or see the defendant. The court shall also ensure that:
>
> 1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
>
> 2. The recording equipment was capable of making an accurate recording, the operator was competent and the recording is accurate and is not altered.
>
> 3. Each voice on the recording is identified.
>
> 4. Each party is afforded an opportunity to view the recording before it is shown in the courtroom.

Four witnesses (Heather's mother, a baby sitter and two psychotherapists) were allowed to testify, over Webb's objection, about certain out-of-court statements which Heather made to each of them. In addition and also over Webb's objection, the jury was shown a videotaped interview of Heather conducted at the Children's Hospital and Health Center in San Diego, California.

Webb was convicted as charged and sentenced to consecutive prison terms of seventeen and twenty years. He filed a direct appeal, alleging that his rights pursuant to the Confrontation Clause of the Sixth Amendment were violated by the admission into evidence of the out-of-court statements and the videotape. The Arizona Court of Appeals affirmed his conviction and the Arizona Supreme Court denied Webb's Petition for Review.

## EXHAUSTION OF REMEDIES

A state prisoner must have exhausted his state remedies in all claims contained in a habeas corpus petition before such a petition will be considered by the federal court. *Rose v. Lundy*, 455 U.S. 509, 523, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); *accord* 28 U.S.C. §2254(b). A petitioner must present his claims to the state

courts on direct appeal or through collateral proceedings. *Lindquist v. Gardner*, 770 F.2d 876, 877 (9th Cir. 1985); accord *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981); 28 U.S.C. §2254(c). The exhaustion requirement as to a particular claim is satisfied once that claim has been fairly presented to the highest state court. *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3336, 92 L.Ed.2d 741 (1986). A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which his claim is based. *Picard v. Conner*, 404 U.S. 270, 277-8, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971); *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986).

The constitutional issues raised by Webb in this action were previously raised in his direct appeal. Webb presented his claims to the highest state court for review and thereby exhausted his state court remedies.

## DISCUSSION

Webb challenges his conviction on the grounds that it violated his right to confront and cross-examine witnesses against him, as guaranteed by the Sixth and Fourteenth Amendments.[2]

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Maryland v. Craig,* ___ U.S. ___, 110 S.Ct. 3157, 3162, 111 L.Ed.2d 666 (1990); *Coy v. Iowa,* 487 U.S. 1012, 1015, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988); *Kentucky v. Stincer,* 482 U.S. 730, 736, 107 S.Ct. 2658, 2662, 96 L.Ed.2d 631 (1987); *Ohio v. Roberts*, 448 U.S. 56, 62, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980).

> This language "comes to us on faded parchment" (citation omitted) with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of

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2. Whether the challenged evidence was admitted into evidence in violation of Arizona's hearsay rules in an issue of state law. The only question before this court is whether Webb was denied his Sixth Amendment right to confront the witnesses against him. *See Nelson v. Farrey,* 874 F.2d 1222, 1226 (7th Cir. 1989).

> confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts 25:16.

*Coy v. Iowa,* 487 U.S. at 1015, 108 S.Ct. at 2800.

The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. *Craig* at 3162; *Coy v. Iowa,* 487 U.S. at 1016, 108 S.Ct. at 2800.

"Simply as a matter of English" and "[s]imply as a matter of Latin as well", the Confrontation Clause confers at least a right to meet face to face all those who appear and give evidence at trial". *Id.* This interpretation derives not only from the literal text of the Clause, but also from an understanding of its historical roots. *Craig* at 3162. "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence--face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . .' Richard II, act 1, sc.1." *Coy v. Iowa,* 487 U.S. at 1016, 108 S.Ct. at 2800.

The Confrontation Clause provides two types of protection for criminal defendants:[3] the right to physically face those who testify against them and the right to conduct cross-examination. *Id.* The right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause--the right to cross-examination. Both ensure the integrity of the fact-finding process. *Id.*

The central concern of the Confrontation Clause is to ensure the reliability of the evidence introduced against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. *Craig* at 3163. As noted in earlier Supreme Court decisions, the primary object of the Confrontation Clause was to prevent depositions or *ex parte* affidavits from being used in lieu of a personal examination and cross-examination of the witness. *Id.* More recently, the Court has described the literal right to confront the witness at the time of trial as forming the core of the values furthered by the Confrontation

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3. Webb addresses each of these two protections separately. We choose to address them together.

Clause. *Coy v. Iowa,* 487 U.S. at 1017, 108 S.Ct. at 2801. Face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. *Craig* at 3164. The Court has also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence: "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Id.*

While the Supreme Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, *Id.* at 3165; *Ohio v. Roberts,* 448 U.S. at 65, 100 S.Ct. at 2537, the Court has recognized that competing interests, if closely examined, may warrant dispensing with such confrontation. *Id.* at 64, 100 S.Ct. at 2538. Face-to-face confrontation is not the *sine qua non* of the confrontation right. *Craig* at 3164. The Court has never held that the Confrontation Clause guarantees criminal defendants an absolute right to face-to-face meeting at trial with witnesses against them, *Id.* at 3163; nor has the Court ever insisted on an actual face-to-face meeting at trial in every instance in which testimony is

admitted against a defendant. *Id.* at 3164. The Court has repeatedly held that the Confrontation Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the inability to confront the declarant at trial. *Id.* Although hearsay rules and the Confrontation Clause are generally designed to protect similar values, the United States Supreme Court has been careful not to equate the prohibitions of the Confrontation Clause with the general rule prohibiting the admission of hearsay statements. *Idaho v. Wright,* ___ U.S. ___, 110 S.Ct. 3139, 3146, ___ L.Ed.2d ___ (1990). A literal reading of the Confrontation Clause would abrogate virtually every hearsay exception, a result long-since rejected as too extreme. *Craig* at 3165. Consequently, there has been a continuing struggle to define the relationship between the Confrontation Clause and the hearsay rule.

Rights conferred by the Confrontation Clause are not absolute and may give way to other important interests, particularly where those rights are only "reasonably implicit" in the Clause, such as the right to cross-examine and the asserted right to a face-to-face

confrontation at some point in the proceedings other than the trial itself. *Coy v. Iowa,* 487 U.S. at 1020, 108 S.Ct. at 2802-03.

The denial of the right to confront and cross-examine witnesses calls into question the ultimate integrity of the fact-finding process; but the right is not absolute, and although a competing interest must be closely examined, the right may bow to accommodate other legitimate interests in a criminal trial. *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 12 L.Fd.2d 923 (1965). *Nelson v. Farrey* at 1310.

While exceptions may exist to ". . .the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*. . .'" (Citation omitted) (Emphasis in original) *Craig* at 3163, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assure. *Id.* at 3166.

A state's interest in protecting minor victims of sex crimes from further trauma and embarrassment is a compelling one and "a State's

interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 3167.

The Confrontation Clause operates in two separate ways to restrict the admissibility of hearsay evidence. If the prosecution wishes to use an out of court statement against the defendant, it must usually produce the declarant, or demonstrate his or her unavailability. *Ohio v. Roberts,* 448 U.S. at 65, 100 S.Ct. at 2538. Once it is demonstrated that the declarant is unavailable, the hearsay statement is admissible only if it bears adequate indicia of reliability. *Id.* at 66, 100 S.Ct. at 2539. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Otherwise the evidence must bear "particularized guarantees of trustworthiness." *Id.*

A. Unavailability

A witness is not unavailable for purposes of Confrontation Clause analysis unless the prosecution has made a good-faith effort to obtain her presence at trial. *Ohio v. Roberts,* 448 U.S. 45, 74, 100 S.Ct.

2531, 2543, 65 L.Ed.2d 597 (1980). The burden is on the prosecution to establish the unavailability of the witness. *Id.* A witness cannot be declared unavailable simply because the prosecutor or court concludes that the witness might not want to testify, *Nelson v. Farrey,* 874 F.2d 1222, 1230 (7th Cir. 1989).

The constitutional issues in this case closely resemble those involved in *two other Arizona cases, State v. Robinson,* 153 Ariz. 191, 735 P.2d 801 (1987) and *State v. Allen*, 157 Ariz. 165, 755 P.2d 1153 (1988).

*Robinson* involved a defendant convicted under Arizona law of two counts of sexual conduct with a minor and two counts of child molestation. At issue was the admission into evidence of certain out of court statements of a five year old victim, Nicole. Nicole did not testify at Robinson's trial. Having attempted to testify at Robinson's previous trial,[4] the judge presiding at the second trial found her legally unavailable to testify due to an existing mental infirmity. He based his finding on expert testimony indicating that Nicole would be uncommunicative if asked about the assault and could be further

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4. This first trial ended in a hung jury.

proceedings. He also reviewed the transcripts of Nicole's prior attempts at live and videotaped testimony. Based on this evidence, he concluded that Nicole was incapable of testifying about the event. *Robinson* at 195, 735 P.2d at 805.

The Arizona Supreme Court expressed a preference that the trial judge personally examine the declarant prior to making such a determination of unavailability. Nonetheless, the court found that there was sufficient evidence in the case to support the discretionary determination of the judge that Nicole was unavailable as a witness. *Id.* at 203–04, 735 P.2d at 813–14.

In *Allen*, the defendant was convicted of one count of child molestation. The victim was a six year old girl named Cara. Cara did not testify at trial. All the evidence about the crime charged came from the testimony of her mother and an investigating police officer. *Allen* at 166, 755 P.2d at 1154. No physical evidence of abuse was presented by the prosecution. *Id.* at 170, 755 P.2d at 1158.

motion to videotape the victim's testimony; and in *Allen,* as in this case, the victim was unresponsive. *Id.* at 169, 755 P.2d at 1157.

The court in *Allen* sidestepped the issue of availability, finding that the defendant waived the issue by failing to object. *Id.* at 170, 755 P.2d at 1158. The court commented in passing that the trial judge had ruled the witness unavailable, based solely upon the prosecutor's statement that the child was unable to testify. The court further noted that although the trial judge was present at the aborted videotaping session where the victim could not answer questions, "we do not believe that this coupled with the prosecutor's statement would have constituted a sufficient determination [of unavailability] . . . " *Id.* at 169, n.9, 755 P.2d at 1157, n.9.

In the case at bar, there was no expert testimony regarding Heather's inability to testify at trial or the trauma such testimony might have caused her. The court apparently based its determination of unavailability solely upon Heather's refusal to answer questions at the videotaping session (at which the trial judge was present) and

uncommunicative.

Although this might not pass muster under Arizona law (*See Allen* at 169, n.9, 755 P.2d at 1157, n.9), this court cannot say that the Confrontation Clause was violated by the trial court's exercise of discretion. Webb had the opportunity to call Heather as a witness and chose not to do so. As pointed out by the court in *Robinson:*

> In addition to the factors considered by the trial judge, we note that defense counsel apparently could have called Nicole as a defense witness (the trial judge did not find Nicole incompetent) if he thought here testimony was in Robinson's best interest. Although the state bears the burden of proving unavailability when it offers the declarant's out-of-court statements, defense counsel's unwillingness to call Nicole as a defense witness is not irrelevant. . . .[I]t is difficult to find a clear violation of the confrontation clause when, as here, the state has facially valid reasons for not calling the declarant, the state's hearsay evidence is supported by particularized guarantees of trustworthiness, the record supports the trial court's finding that the witness is incapable of testifying, and the defendant makes no attempt to call the witness even though she was physically present.

Id. at 204, n.15, 735 P.2d at 814, n.15.

Given Heather's extremely young age, the trial judge's personal observation of her unwillingness to answer questions at the videotaping session and the tactical decision of defense counsel to

forego calling her as a defense witness, it is the opinion of this court that the trial court's finding of her unavailability did not violate the Confrontation Clause.

B. Sufficient Indicia of Reliability

The burden is on the state, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, to prove that the evidence in controversy bore sufficient indicia of reliability to withstand scrutiny under the Confrontation Clause. *Wright* at 3147.

*Wright* involved a defendant who was charged under Idaho law with two counts of lewd conduct with a minor, specifically her 5 1/2 and 2 1/2 year old daughters. The trial court conducted a *voir dire* examination of the younger daughter, who was three years old at the time of trial, to determine whether she was capable of testifying. The court concluded, and the parties agreed, that the younger daughter was "not capable of communicating to the jury." *Wright* at 3143. Nonetheless, the court admitted, pursuant to Idaho's residual hearsay exception, certain statements which she had made to a pediatrician having extensive experience in child abuse cases.

Wright asserted that the admission of these statements violated her rights under the Confrontation Clause and the Supreme Court agreed, finding "no special reason for supposing that the incriminating statements were particularly trustworthy." *Id.* at 3152.

In *Wright,* the Supreme Court reaffirmed its "suggestion" in *Roberts* that the indicia of reliability requirement could be met in either of two ways: "where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.'" *Id.*

Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. *Id.* By contrast, residual hearsay exceptions accommodate ad hoc instances in which statements not otherwise falling within a recognized hearsay exception may be found to be sufficiently reliable to be admitted at trial. *Id.* Hearsay statements admitted under the residual exception, "almost by definition", do not share the same

tradition of reliability that support admission under a firmly rooted hearsay exception. *Id.* at 3148.

The trial judge in this case based his evidentiary rulings on Arizona Revised Statutes §§ 13-1416 and 13-4252.[5] In ruling that each of the challenged statements was admissible, however, the trial judge found each to have a sufficient indicia of reliability. Our review of the record reveals that each of the statements was admissible pursuant to a firmly rooted hearsay exception. Furthermore, we find that each statement is supported by "particularized guarantees of trustworthiness". Consequently, the admission of the statements did not violate Webb's rights under the Confrontation Clause.

1. Statements to Connie Martin and Linda Morton were admissible pursuant to a firmly rooted hearsay exception.

The statements made by Heather to Connie Martin and her mother, Linda Morton, were admissible under the "excited

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5. A.R.S. §13-1416 has since been held unconstitutional by the Arizona Supreme Court. *See State v. Robinson*, 153 Ariz. 191, 198, 735 P.2d 801, 808 (1987).

utterance" exception to the hearsay rule.[6] To qualify as an excited utterance, the declarant must have experienced a startling event or condition and reacted while under the stress or excitement of that event and not from reflection and fabrication. *Morgan v. Foretich,* 846 F.2d 941, 947 (4th Cir. 1988). The testimony of Silvia Strickland, M.D. was sufficient to justify a finding that Heather had been sexually abused. The question therefore is whether or not Heather was under the stress of this "startling event" when she made her statements to her mother and Connie Martin or whether they could have resulted from "reflection and fabrication".

It is undisputed that Heather made her first references to the sexual abuse, at least several weeks after the abuse took place. In a case involving the sexual abuse of a child, however, the lapse of time between the "startling event" and the out-of-court statements, while relevant, is not dispositive in the application of the excited utterance rule. *Morgan v. Foretich* at 947; *Iron Shell,* 633 F.2d 77,

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6. Fed. R. Evid. 803(2) and Ariz. R. Evid. 803(2) both provide:

> **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

85 (8th Cir. 1980) *cert. denied,* 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). Other appropriate factors to consider are:

1) The age of the declarant;

2) The physical and mental state of the declarant;

3) The characteristics of the event; and

4) The subject matter of the statements.

*Morgan v. Foretich* at 947; *Iron Shell* at 85-86.

When Heather made her statements to Connie Martin, on or about September 23, 1986, she was approximately two and one-half years old. She first told Martin, without prompting, that Terry had put medicine in her and that Terry was either a bad man or a bad boy and that he hurt her. When asked an open-ended, non-leading question, "Why is Terry a bad man?", she responded, while pointing to her vaginal area, that he put medicine up inside her. She stated that he pulled his pants down and stuck his finger up inside her; and that it hurt her were she went "pee-pee" and hurt her "tummy". When asked where this occurred, Heather stated that Terry put her in bed and told her to shut her eyes. When asked if Terry had said anything to her, Heather responded by doubling up her fist, putting

it in Martin's face and saying "Terry say, 'Don't you tell, Heather!'". A little while later, while passing a motel where Webb had admittedly lived and where Heather had on occasion stayed, Heather appeared to be afraid of the motel, saying that Terry was in there and was going to hurt her.

During the next couple of days Heather repeated her statements; and on or about September 30, 1986, she stated Terry had put his "pee-pee" in her mouth and that it dripped in her mouth and made her gag. She said she wanted to try to get the medicine out of her throat.

The next day, also completely unsolicited, Heather told Martin that Terry had put his "pee-pee" in her side. When asked where in her side, Heather sat down spread-eagle and pointed to her vaginal area.

Some time around the end of September 1986, contemporaneously with her statements to Connie Martin, Heather saw her mother applying some vaginal cream and, appearing shocked, asked her mother what she was doing. When Linda Morton explained that she

was applying medicine, Heather spontaneously replied that Terry had put medicine on her.

All of Heather's statements to her mother and Martin were spontaneous in nature and made with little or no prompting. If there is evidence of prior interrogation, manipulation, or prompting by adults, spontaneity may be an inaccurate indication of trustworthiness, *State v. Robinson,* 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987); but there is no such evidence in this case. Nor was there any evidence that either Martin or Morton had any motive to lie about the statements made.

Heather's statements to her mother and Martin were made while she was still suffering psychological pain and distress from the assaults. Her childish terminology had a ring of truth to it and was entirely appropriate for a girl of her age. Furthermore, Heather was a mere two and one-half years old at the time the statements were made, which makes it all the more unlikely that reflection and fabrication were involved.

It is, in the words of the *Morgan v. Foretich* court, "virtually inconceivable" that a child of Heather's "tender years" would have

the extensive knowledge of sexual activities or the desire to lie about the sexual abuse that would be required to lie about a story such as Heather's.

For all of these reasons, we believe that Heather's statements to her mother and Connie Martin were admissible pursuant to the excited utterance exception.

2. Statements to Scheider and Proctor were admissible pursuant to a firmly rooted hearsay exception.

Heather's statements to Jacquie Scheider and Linda Proctor were hearsay, but were admissible as statements made for purposes of medical diagnosis or treatment.[7] The hearsay exception for statements made in furtherance of medical treatment is based on the rationale that the declarant's motive guarantees the trustworthiness of the statements since treatment will depend on what is reported.

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7. Rule 803(4) of the Federal Rules of Evidence and the Arizona Rules of Evidence provides for the admission of statements which are:

> . . .made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

*Morgan v. Foretich* at 949. The crucial question involved in analyzing the admissibility of a statement under this hearsay exception is whether the out-of-court statement was reasonably pertinent to diagnosis or treatment. *United States v. Renville,* 779 F.2d 430, 436 (8th Cir. 1985); *see United States v. Nick,* 604 F.2d 1199, 1202 (9th Cir. 1979). The declarant's motive in making such a statement must be consistent with the purpose of promoting treatment; and the content of the statement must be the type which would be reasonably relied upon by the physician. *Morgan v. Foretich* at 949; *Renville* at 436; *Iron Shell* at 84. It is assumed that a patient has a strong motive to tell the truth when her treatment or diagnosis will depend on the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness. *Renville*, 779 F.2d at 436.

In *Iron Shell*, the Eighth Circuit opined that statements relating to the identity of an individual allegedly responsible for personal injuries would seldom, if ever, be reasonably pertinent to diagnosis. *Id.* at 84. This opinion was qualified in *Renville,* however, where the Eighth Circuit held that statements made to a physician during

an examination, than an abuser is a member of the victim's immediate family, *are* reasonably pertinent to treatment. *Id.* at 436. The court found that such statements differ significantly from ordinary statements of fault, in that they are reasonably relied upon by a physician in treatment. *Id.* at 436–37. The court reasoned that "child abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime. (Citations omitted). The exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser." *Id.* at 437.

Although the court in *Renville* was specifically addressing child abuse which occurs at home, there is no rationale for failing to extend this rule to include situations such as this one, where the statements of identity refer to trusted friends of the family who frequently provide custody and care for the child.

> "The psychological sequelae of sexual molestation by a father, other relative, or family friend may be different and require different treatment than those resulting from abuse by a stranger. (Citation omitted) Furthermore, effective treatment may require that the victim avoid contact with the abuser, not just to prevent further abuse, but also to facilitate recover from past abuse."

*State v. Robinson,* 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987).

Although Heather's statements were made to psychotherapists, nothing in the hearsay exception limits its application to physicians. Heather's statements were made for the purpose of diagnosis and treatment and were admissible under the hearsay exception.

Finally, the fact that most of Heather's statements to Ms. Proctor were presented to the jury via a videotape, rather than through the direct testimony of Ms. Proctor, has no affect on our analysis. As pointed out by the trial judge, since Ms. Proctor could have testified directly as to what Heather has stated in the interview, allowing the jury to view the interview on videotape could only enhance the accuracy of the statements.

3. Particular Guarantees of Trustworthiness

As discussed above, each of the disputed statements fell within a firmly rooted hearsay exception; even if this were not the case, the statements had "significant guarantees of trustworthiness" and for this reason as well, did not violate the Confrontation Clause.

The state and federal courts have identified a number of factors that are relevant in determining whether statements made by a child

witness in a child sexual abuse case bear particularized guarantees of trustworthiness under the Confrontation Clause. *Wright* at 3150. Some of these factors are spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age and lack of motive to fabricate. *Id.* These factors are not exclusive and courts have considerable leeway in their determination of appropriate factors. The unifying principle is the relationship of these factors to whether it is "particularly likely" that the child declarant was telling the truth when the statement was made. *Id.*

Although the "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, the relevant circumstances encompass only those that surround the making of the statement and that render the declarant worthy of belief. *Id.* at 3148 & 3149. To be admitted, the evidence must be "so trustworthy that adversarial testing would add little to its reliability." *Id.* at 3149. In *United States v. Nick,* the court looked to Rule 803(24) of the Federal Rules of Evidence (the so-called "catch-all" rule) for a

"useful set of criteria" to use in conducting a confrontational clause analysis:

> The circumstances under which the statement was made must indicate a very high degree of reliability and trustworthiness; the statement must be offered as evidence of a material fact; the statement, although not essential for proof of the point for which it is offered, must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;" and the interest of justice will best be served by admission of the statement into evidence.

*Id.* at 1203.

Heather's statements were all made while she was still suffering psychological pain and distress from the assaults. They were in large part spontaneously or in made in response to non-leading questions. Her statements to the two psychotherapists were consistent with her previous statements and were also made in response to open-ended and non-leading questions. Her childish terminology has the ring of veracity and is appropriate to a child of her age. Her statements were unquestionably material and were more probative as to the identity of the assailant than any other evidence. Her declarations were more, rather than less, probative than testimony she might have been able to give months after the

event. *See id.* at 1204. Finally, the interests of justice were served by admitting Heather's declarations, given that she was the victim of a sexual assault and "far too young to appreciate the implications of the assault". *See id.*

Although the court in *Nick* also relied on corroborating physical evidence, the Supreme Court has specifically disapproved of the use of corroborating evidence to support a finding that a hearsay statement bears particularized guarantees of trustworthiness. Finding that the use of such corroborating evidence would allow the admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence, the Court held that hearsay evidence must possess indicia of reliability by virtue of its inherent trustworthiness, not by virtue of other evidence at trial. *Wright* at 3150. Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. *Id.* at 3151.

The Court did recognize that corroborating evidence might be an appropriate indication of whether any error in admitting the statement might be harmless. *Id.*

There is no need to depend on corroborating evidence in this case, for the statements themselves are "inherently trustworthy".

## CONCLUSION

There is a compelling need for the admission of the hearsay statements of young sexual assault victims who are unable or refuse to verbally express themselves in court, when the child and the perpetrator are the sole witnesses to the crime. *State v. Sorenson,* 143 Wis.2d 226, 421 N.W.2d 77, 84 (1988). It is the modern rule that the administration of justice is best served, in cases involving young child victims of sexual assault, by the admission of their statements made in a more relaxed environment than the traditional courtroom setting, without the possibility of a traumatic courtroom encounter. *United States v. DeNoyer,* 811 F.2d 436, 438 (8th Cir. 1987).

Each of Heather's out-of-court statements fell within a firmly-rooted hearsay exception. Furthermore, the circumstances

surrounding each of Heather's statements strongly suggest the "particular guarantees of trustworthiness" necessary to avoid a violation of the Confrontation Clause. These include Heather's young age, her relationship to the witnesses and the lack of motive for any of the witnesses to fabricate or distort the contents of the statements. Many of the statements were spontaneous and all demonstrated remarkable consistency. The child-like terminology which Heather used in describing sexual acts and circumstances of which a child of her "tender years" should not have been aware also lend additional credibility to the statements.

For all of these reasons, we find that Webb's rights under the Confrontation Clause were not violated by the admission of Heather's out-of-court statements.

IT IS THEREFORE RECOMMENDED that the Petition for Writ of Habeas Corpus be denied.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's

judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

DATED this 15 day of July, 1992.

STEPHEN L. VERKAMP
United States Magistrate Judge